

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Developing a Unified Inter-carrier)	CC Docket No. 01-92
Compensation Regime)	

COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.

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Qwest Communications International Inc. (“Qwest”) hereby submits its comments on the Inter-carrier Compensation proposal submitted on July 24, 2006 as part of a joint effort by a variety of industry participants (hereinafter “Missoula Plan” or “Plan”).¹

I. INTRODUCTION AND SUMMARY

In this proceeding, the Federal Communications Commission (“Commission”) is seeking to reform a system of inter-carrier compensation that has become, at best, dysfunctional. The current system is uneconomic, subsidy-laden and discriminatory, almost uniformly sending erroneous economic signals to the telecommunications marketplace. The Commission has been contemplating how to construct an acceptable inter-carrier compensation system for nearly six years. The current round of filings will hopefully bring the Commission closer to resolving this critical issue.

An inter-carrier compensation plan, in order to be reasonably successful, must enable carriers to focus their energies on service, not arbitrage, and must be technology and service neutral. Anomalies such as the “ESP [enhanced service provider] exemption” and the split

¹ NARUC Notice of Written *Ex Parte* Presentation (47 C.F.R. § 1.1204(a)(10)) (“NARUC *Ex Parte*”); *see also* Comment Sought on Missoula Inter-carrier Compensation Reform Plan, CC Docket No. 01-92, Public Notice, 21 FCC Rcd 8524 (July 25, 2006), Order, DA 06-1730 (Aug. 29, 2006).

between interstate and intrastate access charges, which result in dramatically different charges being assessed by carriers for identical services, *and* “ISP [Internet service provider] reciprocal compensation,” which results in economically ruinous “one-way reciprocal compensation,” must be eliminated. Carriers must also be required to look to their own customers for compensation, rather than to the customers of other carriers based upon artificial regulatory obligations. In addition, in achieving a rational rebalance of intercarrier compensation, any plan must recognize that regulatory shifts that result in revenue losses (or increased expenses) for carriers must be accompanied by a mechanism that permits the carriers the opportunity to recover the lost revenues or increased costs. Thus, the plan must be comprehensive, in that it does not leave loose ends to create new arbitrage opportunities. At the same time, the plan must be simple. Given the complexity of the issues as they have evolved over the past two decades, it is possible to devise a plan that, while reasonable on paper, is so complicated that it simply cannot work in the real world.

Qwest has submitted a proposal denominated “bill-and-keep at the edge” that still fits the requirements for a rational plan better than anything else that has appeared on the record. The new round of filings surrounding the so-called “Missoula Plan” again documents the wisdom of a bill-and-keep at the edge approach to intercarrier compensation, rather than a system where carriers pay regulated rates to each other for transport and termination. This is particularly true in the case of the Missoula Plan, where the rates that carriers pay each other are not symmetrical, creating new and additional arbitrage and subsidy opportunities and requirements, and where the Plan itself is so complex that the likelihood of its being implemented as anticipated is fairly remote.

In these comments Qwest discusses some of the major defects in the Missoula Plan. These comments also discuss those areas where the Missoula Plan, while not optimal, could be better than the current situation. Overall, however, the new insights provided by the Missoula Plan again point to the basic correctness of Qwest's bill-and-keep at the edge solution.

A. Components Of Missoula Plan.

In the Missoula Plan, a group of carriers present a compromise approach to the thorny problem of intercarrier compensation. While there are, as discussed herein, numerous flaws in the Missoula Plan as currently presented, the sheer scope of the effort undertaken by its proponents requires that it be taken seriously. Indeed, while the failure of the Missoula Plan to move towards a bill-and-keep solution constitutes a signal flaw in the Plan, some of the ideas and concepts elucidated in the Missoula Plan (ideas that unfortunately are not actually realized in the details of the Plan itself) form a starting point from which a viable restructuring of intercarrier compensation might be accomplished. However, the flaws in the Missoula Plan are very significant, and the Plan cannot reasonably be adopted as presented.

The Missoula Plan has at its core three key concepts that Qwest will address herein. The first predicates intercarrier compensation on the location of "edges" of the networks of respective originating and terminating carriers. Under the "edge" approach, originating carriers are financially responsible for delivering traffic to the "edge" of the terminating carrier's network, a process that is reversed when the terminating carrier delivers its own traffic to the "edge" of the first carrier. This is a fundamentally sound approach to intercarrier compensation, one that Qwest has advocated in the past. But the "edge" concept must be based on uniformly defined network edges, and the Missoula Plan significantly undercuts itself when it creates asymmetric "edge" rules based on which of three "tracks" a carrier fits within -- tracks that would be

established to govern how intercarrier compensation relationships would ultimately be determined. The edge approach to intercarrier compensation is the proper approach, but it must be based on symmetrical and non-discriminatory edge definitions.

Second, the Missoula Plan claims to provide a “unitary” termination compensation approach, pursuant to which the variegated intercarrier compensation rates and systems that create so much arbitrage opportunity today would be ultimately replaced with a single rate. While a truly unitary termination approach to reforming intercarrier compensation is not, in Qwest’s opinion, the equal of a much more easily administrable and comprehensible bill-and-keep structure, it may provide an improvement over the current system.² But the Missoula Plan does not actually propose a unitary termination approach. Instead, the Missoula Plan undermines its own premises by allowing a carrier three-track system and rules that preserve the unique historical arrangements for commercial mobile radio service (“CMRS”) providers and rural local exchange carriers (“LECs”) that undercut the unitary termination charge. The track system establishes unequal transition timing, asymmetric charges for wireless traffic, and variable edge and transport requirements, and unequal subscriber line charge (“SLC”) caps, among other disparities, all of which are the antithesis of a unitary termination charge. Thus, the merits of a unitary termination rate, as opposed to bill-and-keep, are not directly raised in the Missoula Plan because an actual unitary termination rate is not proposed. Should an actual unitary rate structure be proposed and accepted, the Commission will at that time need to address the appropriate rate level.

² In some senses a bill-and-keep structure could be viewed as a unitary termination charge of zero. However, we submit that the difference between a prescribed rate and a bill-and-keep structure is significant. A bill-and-keep structure does not lend itself to subsequent manipulation. If intercarrier compensation were to be based on reciprocal compensation principles with a rate of zero, that would be an open invitation to assessing increased rates in the future.

Finally, the Missoula Plan makes a serious attempt at resolving the inevitable jurisdictional conflicts that must be addressed in any comprehensive plan for reforming intercarrier compensation that purports to cover all traffic, interstate as well as intrastate. Intercarrier compensation “reform” that covered only interstate traffic would be useless, because some of the most serious pricing anomalies that must be resolved via a meaningful intercarrier reform are caused by the fact that federal and state rates for the identical services (*e.g.*, carrier access) are often wildly disparate. The approach adopted by the Missoula Plan -- bringing all terminating traffic within the scope of Section 251(b)(5) of the 1996 Telecommunications Act (“Act”),³ while hoping for the best in the case of originating intrastate traffic -- leaves matters too uncertain to permit actual reliance by carriers for business case development and network investment on the ultimate unification of intercarrier compensation. A legal solution that actually, not potentially, resolves intercarrier compensation in the long term in a manner that is able to transcend traditional jurisdictional limitations is a necessity.⁴

B. Necessary Components Of Any Successful Plan.

Qwest perceives that there are several critical components of any successful approach to intercarrier compensation. The Missoula Plan recognizes and addresses each of these areas. While the approach of the Missoula Plan to each is significantly flawed, Qwest believes that the fact that the authors of the Missoula Plan address each of these issues presents a starting point for final analysis that should permit the Commission to devise and implement a reasonable intercarrier compensation regulatory structure. The major hallmarks of any successful approach

³ 47 U.S.C. § 251(b)(5); *see also* Missoula Plan, Executive Summary at 4, Policy and Legal Overview, Attachment A at 1-8. This does not apply to Track 3 carriers under the Plan, which would continue to charge terminating access -- yet another anomaly that the Missoula Plan would create.

⁴ This comprehensive jurisdictional analysis would also need to resolve the question of whether the Commission can set rates for intercarrier compensation under Section 251(b)(5) of the Act.

to intercarrier compensation, and where the approach advocated in the Missoula Plan is at variance with these necessary components, form the major focus of these comments.

First, any intercarrier compensation regulatory structure must be comprehensive. That is, it must harmonize the regulatory disparities that result in differing charges for exchange of the same types of traffic, and must do so in a manner that integrates both disparate Commission rules as well as differing interstate and intrastate rules into a single structure that comports with rational economic principles. The Missoula Plan claims that its approach addresses this problem through a unitary rate for all terminating traffic. As noted, even if implemented comprehensively, the Missoula Plan does not really propose a unitary termination rate. What is more, the Missoula Plan's approach to state jurisdiction fails to overcome significant jurisdictional hurdles that could prevent even the adoption of what rate uniformity it does propose. While the Missoula Plan makes a bona fide effort to harmonize interstate and intrastate jurisdictional concerns, its treatment of intrastate originating switched access is far too vague and ambiguous to permit meaningful implementation, and provides little comfort that it would ultimately be lawful if adopted. Additionally, its assumption of federal rate setting authority under Section 251(b)(5) of the Act is over-optimistic. It is imperative that a plan actually deal definitively with all aspects of intrastate access charges as a *sine qua non* of a viable plan.

Second, the reform must permit carriers a realistic opportunity to recover through other sources any revenues that are lost through mandatory access and reciprocal compensation rate reductions and mandated expense increases (*e.g.*, increased rates for ISP-bound and incumbent LEC ("ILEC") extended area service ("EAS") traffic) ordered as part of the plan. This does not mean that the Commission can or should become the guarantor of the profitability of any affected carrier, or that the plan must assure each carrier that it will earn as much the year after

the plan was implemented as it did the year before. However, in all cases where compliance with the plan results in a revenue reduction or a mandated expense increase to a carrier, that carrier must have a reasonable opportunity, consistent with the level of market competition and regulatory reality, to recover the lost revenues from other sources not previously available. The Missoula Plan recognizes this necessity and addresses it through increased SLC charges (which is conceptually a good idea) and through increased universal service funding and payments (which is a bad idea). The point is that there must be a realistic opportunity to recover the lost revenues and added expenses directly caused by adoption of an intercarrier compensation plan. The Missoula Plan leaves too many gaps to enable any realistic assessment of the ability of carriers to recover lost revenues and added expenses caused by adoption of the Plan.⁵

Third, the reform must be “holistic.” That is, it cannot be implemented on a piecemeal basis, nor can it be implemented in a manner that allows some parts to take effect but not others. This is a companion to the comprehensiveness criterion. Because the intercarrier compensation infrastructure is so integrally interrelated, it must be structured in such a fashion that the entire issue is dealt with. For example, an intercarrier compensation plan that dealt only with the issues of local and long distance carrier traffic, but did not address ISPs, virtual NXX (“VNXX”) and Voice over Internet Protocol (“VoIP”) issues, would simply drive traffic in the direction of alternative arbitrage opportunities.⁶ The entire issue must be addressed. The Missoula Plan makes an effort to address all relevant issues, although the ultimate result of implementation of the Plan as stated would be that pricing anomalies and arbitrage opportunities would remain.

⁵ The Missoula Plan does provide for a mechanism to recover lost revenues. Missoula Plan at 4. However, the Plan is so complex that it is impossible to determine whether the regulatory recovery vehicle provided by the Missoula Plan will be sufficient.

⁶ On the other hand, as is discussed below, some discrete issues, such as VNXX, VoIP access charges and misuse of the ESP exemption, can be dealt with immediately, and need not await final resolution in the context of overall reform.

This flaw undercuts the ability of the Plan to provide a comprehensive solution to intercarrier compensation and, thus, also disrupts the ability of the Plan to comply with the fourth necessary criterion, competitive neutrality, discussed below.

Fourth, the plan must be competitively neutral. One of the major defects in the current scheme is that it allows arbitrage and other revenue-enhancing opportunities to flow from gaming the regulatory system, either legally or, as has often been the case, by disguising the nature of traffic delivered to a carrier. A good example of that problem is the Herculean effort of carriers to avoid paying LEC access charges, or to avoid paying the appropriate rate based on the proper jurisdiction of a call. Such arbitrage can be conducted through subterfuge -- generally through misclassification of the nature of the caller (end user, including ISP, versus carrier), type of traffic (telecommunications versus information; interexchange versus local) or jurisdiction (interstate versus intrastate access) of a call delivered to or received from a LEC.⁷ It can also be accomplished through existing legal classifications based on the technology used by the carrier (e.g., VoIP). The intercarrier compensation plan must not advantage one competitor over another, one jurisdiction over another, or one technology over another.

The Missoula Plan appears to recognize this basic premise, conceptually, but the substantive terms of the Plan ignore it. For example, the Missoula Plan creates three distinct categories of carriers and assigns to each of them differing rights and responsibilities with regard to the intercarrier compensation regime proposed under the Plan (including, inexplicably, differing levels of SLC increases for the different carrier tracks identified in the Plan). This is

⁷ See, e.g., *In the Matter of Regulation of Prepaid Calling Card Services*, WC Docket No. 05-68, Declaratory Ruling and Report and Order, 21 FCC Rcd 7290 (2006), *appeal pending sub nom. Qwest Services Corporation v. FCC*, No. 06-1274 (D.C. Cir. *pet. for rev.* filed July 13, 2006); *In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges*, WC Docket No. 02-361, Order, 19 FCC Rcd 7457 (2004).

the antithesis of competitive neutrality. The use of telephone numbers to determine whether a call is subject to access or reciprocal compensation likewise provides an artificial competitive advantage to those carriers who do not rely on numbers tied to geographic location as a predicate for their services, thus further violating the competitive neutrality principle.⁸ Additional anomalies are discussed throughout these comments. The point is, despite its good intentions, the Missoula Plan is not competitively neutral.

Fifth, the plan must not create new arbitrage opportunities. While the unitary termination charge approach in the Missoula Plan would take a much needed step towards reducing arbitrage, especially if it were truly unitary, the use of telephone numbers as a surrogate for actual location would be a step in the wrong direction and would undercut any unitary termination approach to intercarrier compensation. Numbers can be manipulated to create arbitrage opportunities, a phenomenon that is increasing daily with the expansion of Internet Protocol (“IP”) and wireless technology, and should only be relied on to reflect geographic location when they do in fact relate to location or when there is no way to determine, either directly or through reasonable formulas, the physical location of a party to a telephone call.⁹ So long as the location of users determines the type of compensation paid to a carrier for delivering traffic on behalf of another carrier, a situation that is ultimately unsustainable in any event, the

⁸ In fact, efforts by carriers to use telephone numbers unrelated to geographic location to misclassify their traffic and avoid their lawful obligations to LECs is an extremely serious problem and is growing more serious daily with the explosion of VoIP services.

⁹ We emphasize that the increasing irrelevancy of telephone numbers in determining geographic location highlights the vital importance of moving to a bill-and-keep structure, or at the very least a truly unitary termination structure. The problem caused by reliance on numbers is not so much in the numbers as it is in the fact that the same service is priced differently depending on where a call came from or where it terminates. The Missoula Plan would now make differing compensation be based on the originating and terminating numbers, which is even more arbitrary. The arbitrage opportunities are inevitable. While imperfect pending resolution through a rational compensation structure, physical location is superior to numbers because, no matter what else, physical location is reasonably permanent.

use of a numbers-based approach that has no relationship to location to determine jurisdiction makes no sense.

Sixth, the plan must be timely -- namely, further delays would be unconscionable. The issue of comprehensively reforming intercarrier compensation was formally raised in a *Notice of Proposed Rulemaking* in 2001, and the need for reform has become more pressing with the passage of time. With each passing year, the problems caused by the existing intercarrier compensation structure become worse as more and more carriers make business decisions that take advantage of the various available arbitrage schemes simply in order to remain in business.¹⁰ Further delay will only create more problems as more carriers are forced into the maw of arbitrage while the current proceeding languishes. Qwest submits that expedited action is both warranted and necessary.

Seventh, the plan must be lawful. Given the importance of this undertaking, it is vital that the order that the Commission actually issues be lawful in the sense of not being vulnerable to judicial reversal. Of primary importance, it is critical that the Commission sort out the jurisdictional issues in a manner that satisfies the requirements of rate uniformity, comprehensiveness and legal soundness. Judicial reversal of a plan two years after carriers have begun to implement it likely would be extremely disruptive, as carriers yet again would be required to revise business plans and restructure intercarrier relationships. In addition, every effort should be made to solicit the advice and support of state regulatory officials in developing a comprehensive plan. Qwest has suggested that a federal-state joint board be convened for the purpose of preparing recommendations for reassigning investment and expenses from the

¹⁰ That is, because carriers are in competition with each other, it is not possible for a carrier whose access costs are triple those of its competitors (because its competitors are taking advantage (legally or not) of regulator-induced pricing anomalies in their own access purchases) to survive. This is a major problem that the Commission must fix.

intrastate to the interstate jurisdiction as a way of strengthening the Commission's ability to adopt a plan that ultimately will be upheld by the courts. Obviously any such plan must leave some discretion to state regulators, but the Commission must retain the ability to enforce uniformity if any plan is to be successful. If a state regulatory agency were to deliberately attempt to undercut the plan (for example, by moving local rates to zero while increasing access rates after the Commission had transferred intrastate originating access costs to the interstate jurisdiction), the Commission could deal with such actions at that time -- although Qwest believes that such action would be highly unlikely. However, the Missoula Plan's proposal to rely on amorphous petitions for preemption to be filed at some time into the Plan's operation is clearly inadequate.

Finally, Qwest's proposal for resolving the intercarrier compensation conundrum includes two additional key and related principles of a successful intercarrier compensation plan -- the plan must be simple to administer and enforce and the plan must ultimately be deregulatory. Qwest has proposed that the Commission adopt a bill-and-keep structure, based on universally defined "edges" of carrier networks, with each carrier having the obligation to transfer its own traffic to the appropriate edge of a terminating carrier's network. Qwest continues to believe that bill-and-keep is the optimal solution to intercarrier compensation, but recognizes that other approaches warrant careful study and consideration. A unitary termination charge approach would certainly be an alternative to the current situation but the Missoula Plan does not actually advocate such a unitary termination system. Moreover, as the Missoula Plan amply demonstrates, crafting a plan that departs from bill-and-keep principles inevitably leads down a road of incredible complexity and opportunities for arbitrage. Frankly, the details of the Missoula Plan are mind-numbingly complex, and one of the key tasks that must be faced by the

Commission if it determines to use a uniform termination charge instead of a bill-and-keep approach to intercarrier compensation is how to develop a system that is not only comprehensive but comprehensible. Qwest is willing to work on simplifying and improving the approach to intercarrier compensation advocated in the Missoula Plan, and seeks to do so in these comments. Nevertheless, in doing so, Qwest remains convinced that the fundamentally simple and reasonable principles documented in Qwest's bill-and-keep at the edge proposal represent by far the superior approach to reforming intercarrier compensation.

In addition, the Missoula Plan maps out a structure which includes intense regulatory involvement in intercarrier relations for the foreseeable future. The focus of the Act is deregulatory, seeking to replace regulation with competition wherever possible. The Missoula Plan's focus on long-term regulation is a defect that is necessitated by the Plan's complexity. Neither complexity nor regulation is or should be a part of intercarrier compensation reform.

II. THE MISSOULA PLAN CANNOT BE ADOPTED AS PRESENTED; IT DOES, HOWEVER, FORM A STARTING POINT FOR DISCUSSING REFORM

A. The Missoula Plan Does Not Present A Truly Unitary Rate.

Overall, the Missoula Plan establishes a mandatory, multi-year schedule for moving to a somewhat unitary intercarrier compensation rate that would apply to reciprocal compensation, interstate access and intrastate terminating access for many telecommunications carriers (Tracks 1 and 2), but not the smallest rate-of-return ILECs (Track 3). Each state commission would decide whether to require the smallest rate-of-return carriers to move their intrastate originating and terminating access charges to their interstate access levels. The Missoula Plan would not extend to originating intrastate access charges, but would allow a carrier to petition the Commission after the end of year one to preempt if a state commission did not act to reform those charges. No timetable is set for action, if any, on these petitions.

If the Commission were to adopt a truly uniform termination rate, it would be a step towards ameliorating the arbitrage problems posed by the current scheme of reciprocal compensation for local traffic and switched access for intrastate and interstate interexchange traffic.¹¹ Currently, disparate rates are often established for the same functional use of a carrier's network, causing customers to seek to reduce their costs by classifying their terminating traffic under the most favorable regulatory category.¹² A unitary rate that is neutral as to the identity of originating or terminating carrier, origin and/or destination of the call, classification of traffic and classification of transmission provider would be an alternative to today's structure. The Missoula Plan does not, however, offer a unitary rate. ILEC rates would vary based upon the ILEC's Track and whether the call was access or non-access. While the Plan states rates for Track 1 and 2 carriers, it only provides that Track 3 carriers' intrastate switched access rates will be reduced to the level of interstate access charges -- leaving the Track 3 rates presently unknowable.¹³ As described below, the use of "tracks" to differentiate carriers mars the entire Plan.

¹¹ Special access is the subject of a separate proceeding, and is not at issue here. *In the Matter of Performance Measurements and Standards for Interstate Special Access Services; Petition of U S West, Inc., for a Declaratory Ruling Preempting State Commission Proceedings to Regulate U S West's Provision of Federally Tariffed Interstate Services; Petition of Association for Local Telecommunications Services for Declaratory Ruling; Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended; 2000 Biennial Regulatory Review - Telecommunications Service Quality Reporting Requirements; AT&T Corp. Petition to Establish Performance Standards, Reporting Requirements, and Self-Executing Remedies Need to Ensure Compliance by ILECs with Their Statutory Obligations Regarding Special Access Services*, CC Docket No. 01-321, Notice of Proposed Rulemaking, 16 FCC Rcd 20896 (2001). Interconnection between adjacent non-competing LECs for the exchange of local traffic occurs on a bill-and-keep basis in most instances. Any modifications to those arrangements could necessitate additional action to enable carriers to retain the opportunity to recoup the lost revenues or increased expenses.

¹² See generally NARUC Task Force on Intercarrier Compensation Process Fact Sheet at 1.

¹³ Missoula Plan at 8. If intrastate switched access rates are at or below interstate levels, the intrastate rates will stay in place for the duration of the Plan. *Id.* at 1.

B. The Use Of Tracks To Differentiate Carriers Mars The Missoula Plan.

The use of “tracks” to differentiate carriers weakens the plan by subsidizing Track 2 and 3 carriers at the expense of customers of Track 1 carriers in a number of ways. First, the Plan’s rules for determining a carrier’s “edge” similarly vary depending on the track to which a carrier is assigned. Second, the concept of the “edge” is meaningless when Track 1 carriers exchange traffic with Track 2 or Track 3 carriers. Under the proposed structure, Track 1 carriers would be required to assume the cost of delivering traffic to Track 2 and 3 carriers at their end offices, even in cases where the end offices sub-tend a tandem. By contrast, Track 2 and 3 carriers need only deliver traffic to Track 1 carriers at the meet point, leaving the Track 1 carrier responsible for getting the traffic from the meet point to its edge. Thus, Track 1 carriers must take responsibility for transport in both directions between the Track 2 or Track 3 carrier’s meet point and the Track 1 carrier’s edge.¹⁴ Third, the rate a carrier may charge for transporting another carrier’s traffic to its edge differs depending upon the Track to which the carrier is assigned. Moreover, disparate EAS rules create arbitrage opportunities based upon a carrier’s Track. Finally, the manner in which carriers are afforded opportunities to make up lost intercarrier compensation revenue unfairly discriminates against Track 1 carriers and their customers.

1. The Disparate Rules For Establishing Edges Are Inexplicable, Discriminatory And Irrational.

The different rules for establishing edges, depending on a given carrier’s Track, discriminate in favor of the Track 2 and Track 3 carriers, add complexity and create billing difficulties. Track 1 carriers choose their edges according to different rules than Track 2 and Track 3 carriers. The differentiation of edge rules results in added expenses to Track 1 carriers

¹⁴ When the traffic is going from the Track 1 carrier to the Track 2 or Track 3 carrier, the Track 1 carrier is responsible for getting that traffic not just to the meet point, but to the Track 2 or Track 3 carrier’s end office. *Id.* at 31-35.

because those carriers are required to deliver traffic to Track 2 carriers at their end offices, whereas Track 1 carriers must receive traffic at their tandems. Specifically, Track 1 carriers “may designate an eligible access tandem location as the edge for the Track 1 carrier’s end offices that subtend that access tandem. The carrier *cannot* designate one of its End Offices as an edge if that End Office subtends the carrier’s own access tandem.”¹⁵ By contrast, Track 2 and Track 3 carriers “may declare *any* eligible End Office to be an edge, even if the End Office subtends the carrier’s own access tandem.”¹⁶ These disparate rules discriminate unfairly against Track 1 carriers, add complexity and create billing difficulties. This asymmetrical arrangement is a major flaw in the Plan, especially when combined with the Rural Transport and Modified Rural Transport Rules.

2. The Rural Transport And Modified Rural Transport Rules Unfairly Favor Track 2 And Track 3 Carriers.

The Rural Transport rules impose an unfair cost burden on Track 1 carriers by lifting from Track 2 and Track 3 carriers the burden of getting traffic to the terminating carrier’s edge when the terminating carrier is a Track 1 carrier. Specifically, the Plan imposes an asymmetric transport burden on Track 1 carriers by requiring them to deliver calls to the end offices of Track 2 and Track 3 carriers, even when those offices sub-tend a Track 2 or Track 3 carrier’s tandem. Track 2 and Track 3 carriers, in contrast, need only deliver traffic to the meet point with the Track 1 carrier, not the Track 1 carrier’s edge, much less the Track 1 carrier’s end office.¹⁷

¹⁵ Missoula Plan at 45 (emphasis in original). A Track 1 carrier may also designate an eligible Trunking Media Gateway, or a point of presence (“POP”) as an edge. The Track 1 carrier may designate an end office, POP or Trunking Media Gateway when the location subtends another carrier’s access tandem. *Id.* at 45-46.

¹⁶ *Id.* at 46 (emphasis in original). Track 2 and Track 3 carriers may also designate an eligible Trunking Media Gateway or a POP to be an edge. *Id.*

¹⁷ *Id.* at 33 and 35.

Moreover, the Rural Transport rule requires the Track 1 carrier to bear the entire financial obligation for provisioning the interconnection transport for the capacity to carry traffic in both directions between the Track 1 carrier's network and the Track 2 or Track 3 carrier's meet point. The Modified Rural Transport rule requires the Track 1 carrier to bear some of the costs for provisioning the interconnection transport for the capacity to carry traffic in both directions between the Track 1 carrier's network and the Track 2 or Track 3 carrier's meet point. These rules are contrary to a rational and non-discriminatory approach that would require that each carrier transport its originating non-access traffic to the terminating carrier's edge. Not only is the Missoula Plan's approach unfair and contrary to the basic premises of rational intercarrier compensation, it is so complex and riddled with rules, exceptions and permutations that it could not be programmed into a billing system without huge costs and major disruptions. In particular, a new billing process may need to be developed because it does not seem that the National Exchange Carrier Association ("NECA") Tariff No. 4 Billing Percent process would work anymore.

3. The Disparate Transport Prices Create Yet Another Subsidy To Track 2 And Track 3 Carriers.

The transport prices from the meet point to the Track 2 or Track 3 carrier's edge create yet another subsidy. This arises because the Track 2 and Track 3 carriers may establish edges at their end offices, while Track 1 carriers have edges at their tandems. Track 2 carriers are allowed to charge up to \$0.0105 for what is called "tandem switching and common transport," in addition to charging \$0.0005 for end-office switching.¹⁸ Track 1 hierarchical carriers, on the

¹⁸ The highest Track 2 rate for tandem switching and common transport is \$0.0105, the cap on a Track 2 rate-of-return carrier. The lowest cap is for Track 2 price cap carriers that are charging originating access. They may charge no higher than \$0.0075 for tandem switching and common

other hand, must include both end-office switching and “tandem switching and common transport” when they provide termination for \$0.0005. Similarly, when it is originating traffic, a Track 1 carrier may charge \$0.0025 for tandem switching and common transport and \$0.002 for end-office switching. A Track 2 carrier, on the other hand, may charge \$0.0075 for tandem switching and common transport and \$0.002 for end-office switching.

This makes the Plan competitively biased because it incents Track 2 carriers to market to end users who primarily receive, rather than make, calls, *e.g.*, ISPs, in order to increase termination traffic flows. The Track 2 carriers’ goal would be to increase their revenues from other carriers.¹⁹ In an extreme, though not implausible, case the Track 2 carrier may even want to pay end users with high traffic coming to them to position themselves behind the Track 2 carrier.²⁰ This not only increases the Track 1 carriers’ intercarrier compensation payments, but also increases their transport costs under the Missoula Plan.

4. The EAS Transport Rules Unfairly Penalize Track 1 Carriers.

The proposed rules for EAS transport arrangements are complex, and unfairly discriminate in favor of Track 3 carriers. For example, the rules for Track 3 ILECs subject to an EAS traffic agreement prohibit a Track 1 carrier from charging transit charges to a Track 3

transport when terminating. Missoula Plan at 13. Again, rates for Track 3 carriers are not knowable at this point under the Plan’s terms.

¹⁹ This phenomenon has already occurred with “ISP reciprocal compensation,” and the Commission has expressly found that such diseconomies harm competition, the market, and the public. *See In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98, 99-68, Order on Remand and Report and Order, 16 FCC Rcd 9151 (2001) (“*ISP Remand Order*”).

²⁰ History tells us that this is not at all implausible. *See Atlas Tel. Co. v. Oklahoma Corp. Comm’n*, 400 F.3d 1256 (10th Cir. 2005).

carrier in an EAS area.²¹ Instead, the Track 1 carrier must, in this scenario, charge the terminating Track 1 carrier when the Track 3 carrier is the originator of the traffic. The Plan should be modified to allow the Track 1 carrier to bill the Track 3 carrier the transit charges. Moreover, the proposed rule is confusing because the same rules would not apply to an EAS arrangement with a Track 2 carrier. This is yet another anomaly creating confusion and disparity under the Plan and thus providing another source of cost, arbitrage and litigation.

5. The Plan For Allowing Carriers An Opportunity To Recover Lost Revenue Is Unfair To Track 1 Carriers And Their Customers.

The Plan anticipates that carriers would have an opportunity to recover revenues previously obtained from access and non-access charges by increasing the maximum monthly SLC and by drawing payments from a new Restructure Mechanism (*i.e.*, universal service support).²² Qwest agrees that the current caps on SLCs should increase in order to recover the lost revenues. The Missoula Plan's proposal to give carriers the option of reducing, but not eliminating originating switched access and limiting increases to the SLC cap provides a sound approach. This is an important option that will provide carriers flexibility to adjust their rates and rate structures to the competitive conditions that each confronts.

The Missoula Plan, while correct in concept, is not correct in implementation. Actual implementation of recovery through SLCs as proposed by the Missoula Plan would harm Track 1 LECs. Separating LECs into three categories, and then forcing Track 1 carriers (who are most exposed to competition and least able to increase rates) and their customers to subsidize other carriers is a fundamentally flawed plan. Similarly, the Restructure Mechanism perpetuates and amplifies defects in the current federal universal service program. Qwest also believes that the

²¹ Missoula Plan at 37-38.

²² Specific lost revenues that would be eligible for recovery from the Restructure Mechanism vary depending on the Track of the carrier.

Missoula Plan does not take sufficient account of the necessity to include additional expenses incurred²³ and revenue forgone²⁴ under any plan as part of the recovery from SLCs, originating access and draws from the federal Universal Service Fund (“USF”).

As stated above, the SLC Caps differ by Track. The SLC increases for residential and single-line business customers served by Track 2 and Track 3 carriers would be limited to \$8.75, whereas Track 1 carriers would be expected to raise their SLCs to those customers to \$10.00 over the course of the Plan. As we understand it, most, if not all, of the \$1.25 difference per-month, per-line, will be made up through revenues provided by the Restructure Mechanism. There is no sound policy reason for imposing a lower ceiling on the SLCs that Track 2 and Track 3 carriers may assess. Plan proponents have not met their burden of presenting a rationale for SLC caps that differ across Tracks.

Moreover, the Plan is clearly not “revenue neutral” since Track 1 carriers (that are more likely to face competitive entry) are not able to recover from the Restructure Mechanism based upon lines lost due to increasing their SLCs, or for any other reason.²⁵ “Unlike Track 1 carriers, Track 2 price-cap carriers that lose lines will not lose Restructure Mechanism dollars during Steps 1 through 3 of the Plan. . . . Starting at Step 4, however, line loss *will* result in a reduction of Restructure Mechanism dollars[.]”²⁶ Track 3 carriers (who are probably the least likely to face

²³ For instance, implementing the Missoula Plan would require plenty of very expensive changes to billing systems.

²⁴ For instance, the Missoula Plan does not explicitly consider signaling. To the extent signaling or call record income is lost, that lost revenue should be included in the income to be recovered.

²⁵ “Because recovery from the Restructure Mechanism is calculated on a *per-line basis*, the loss of a line at any Step of the Plan will result in a loss of Restructure Mechanism dollars.” Missoula Plan at 68 (emphasis in original).

²⁶ *Id.* at 73 (emphasis in original).

competitive entry) could recover based on lost revenue, so the Plan would not take into account line loss.²⁷

The Missoula Plan perpetuates the existing disparities of the USF, and compounds them. Currently, in many instances, Qwest's customers (many of whom are comparable to Track 2 and Track 3 customers) pay higher rates than the customers of a Track 2 or Track 3 carrier because the latter carriers receive revenues from the USF (*i.e.*, the existing high cost support) and have higher access charges. The Missoula Plan does nothing to redress the imbalance. The arbitrary cap on SLC rates would not force carriers with low local rates and high access rates to bring their end-user rates up to the national average. Rather, it allows those carriers to maintain their below-average end-user rates and to replace their high access rates by drawing more from the Restructure Mechanism pot, all funded by customers of other carriers that have end-user rates at or above the national average and more reasonable access rates.²⁸

The first step for recovering forgone intercarrier compensation should be to increase the federal SLC such that the combination of residential and business rates, any state end-user charge, and the federal SLC reach the lower of a national benchmark (assuming rates are below the benchmark) or the level needed to recover the foregone intercarrier compensation. The benchmark rate would be set at 125% of the national average of urban rates for single line residential and business rates, intrastate end-user charges and interstate SLCs for urban wire

²⁷ *Id.* at 73-74.

²⁸ In an August 21, 2006 article of the TR Daily entitled "Nebraska Commissioner Boyle Blasts 'Missoula Plan' as Flawed" Nebraska Commissioner Ann Boyle has argued, "Qwest [Corp.] rural customers, in simple terms, are discriminated against. They are charged a higher subscriber line charge[.]"

centers.²⁹ Only after meeting the benchmark and charging originating access should a carrier be able to draw from the Restructure Mechanism.

In sum, the division of carriers into Tracks and treating carriers differently based upon their Track is a fatal flaw of the Missoula Plan. It renders the Plan biased in favor of Track 2 and Track 3 carriers. Moreover, it makes customers of carriers with high rates subsidize Track 2 and Track 3 carriers that have maintained low rates by making large draws on the federal USF and charging high access fees. The Commission should not adopt the Missoula Plan based upon the discriminatory Track structure alone. At the very least, if the Commission believes it needs to smooth the transition to the new regime for some carriers, then that special treatment must end at a date certain; and that date certain must be in the reasonably near future. Moreover, such temporary favoritism should not cause disruption to the rest of the industry by requiring major changes to ordering, provisioning and billing systems on an interim basis.

C. The Restructure Mechanism Will Further Increase The Size Of The Federal USF.

As stated above, the Plan would establish a Restructure Mechanism to enable primarily Track 2 and Track 3 ILECs³⁰ to recover revenues lost as a result of the Plan's reductions in originating and terminating access charges and other forms of intercarrier compensation.³¹ In addition, the Plan would provide an increase in Lifeline funding, thereby ameliorating the effect of increased SLCs on low-income consumers. Qwest agrees that Lifeline funding should

²⁹ See, e.g., Comments of Qwest Communications International Inc. On Further Notice of Proposed Rulemaking, CC Docket No. 01-92, filed May 23, 2005 at 7, 12 ("Qwest's May 23, 2005 Comments").

³⁰ Revenues from the Restructure Mechanism would only be available to ILECs, although the Plan states that such revenues "will be available to other carriers in circumstances to be determined in the future." Missoula Plan at 74.

³¹ See Section II.B.5., *supra*.

increase. There should not be an increase in any other aspect of the federal USF, except for the Early Adopter Fund, and a minimal increase to reflect the few instances where a carrier meets the benchmark rate, charges originating access and still does not have an opportunity to make up lost revenues and increased expenses.

The proposed increases to universal service funding are counterproductive and harmful. Even the Missoula Plan's proponents acknowledge that the Restructure Mechanism will lead to a \$1.5 billion increase in the federal USF.³² Missoula Plan proponents also propose additional changes to the rural high-cost loop support mechanism and the safety valve mechanism of the federal USF that are not related to interconnection. Missoula Plan proponents have not made any showing why these changes, which are unrelated to interconnection, are necessary as part of their Plan. While the Commission has managed to keep the contribution factor to slightly below 10%,³³ adopting the Missoula Plan will thwart efforts to keep the federal USF to a manageable size.

D. Federal And State Coordination Is Imperative, But The Missoula Plan Does Not Adequately Address This Issue.

Proponents of the Missoula Plan acknowledge that any solution to the intercarrier compensation problem must include coordinated federal and state reform efforts. The Early Adopter Fund, which provides incentives to states to implement the Missoula Plan, is an important aspect of the Plan, which will hopefully lead to increased cooperation from the states. Qwest questions whether the Early Adopter Fund set out in the Plan is sufficient. In addition, as is noted in detail below, the Missoula Plan does not adequately deal with the statutory limitations on the Commission's jurisdiction over intrastate rates.

³² See Missoula Plan, Executive Summary at 13.

³³ See Proposed Fourth Quarter 2006 Universal Service Contribution Factor, CC Docket No. 96-45, Public Notice (Sept. 11, 2006).

E. The Proposal In The Plan To Use Numbers As A Surrogate For Location Is Contrary To Law And Increases The Potential For Arbitrage Problems.

The Plan also proposes a dramatic change to the Commission's traditional policy of determining the jurisdiction of a call based on its end points. The Plan, instead, calls for the jurisdiction of a call to be determined almost exclusively by a comparison of telephone numbers of the calling and called party.³⁴ The Plan acknowledges that telephone numbers do not always accurately identify the geographic locations of the calling and called parties, a phenomenon that is certain to increase exponentially with the increase of IP voice services.³⁵ In addition, as is evident from the VNXX controversy, the use of numbers to determine classification of a call for compensation purposes is easily manipulated into uneconomical arbitrage schemes. Notwithstanding the fact that reliance on numbers is terribly flawed, the Plan contends that jurisdictional accuracy should be sacrificed because a telephone-number-based rule will establish predictable rules.³⁶

The proposed number surrogate rule is contrary to law. One need look no further than the Plan itself to demonstrate this. The "Policy and Legal Overview" section of the Plan acknowledges that "the Commission has relied on geography as the basis for jurisdictionalizing traffic[.]"³⁷ This is because the jurisdiction of traffic is based on where calls originate and terminate. In the past, the telephone number was a reliable indicator of location, because the number almost invariably was associated with a particular end office at a specific geographic

³⁴ Missoula Plan at 25-26.

³⁵ *Id.* at 25.

³⁶ *Id.* at 26.

³⁷ *Id.*, Policy and Legal Overview at 6 (citing First Report and Order, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 16017-18 ¶ 1044 (1996) ("Local Competition Order")).

location. However, this is often not the case any more,³⁸ and schemes to undercut the existing intercarrier rules by use of numbers (generally local numbers that are connected to a remote location) are by now extremely prevalent. The Commission has never deviated from the principle that, because Section 2(b) of the Act bars it from asserting jurisdiction over jurisdictionally intrastate calls, its obligation is to determine as accurately as possible the origination and termination of the traffic in question.³⁹ This is not to say that the Commission is without authority to preempt state regulation in cases where interstate and intrastate calls are so commingled as to prevent separation for regulatory purposes -- the Commission's authority to take such necessary action has often been upheld.⁴⁰ But it would clearly be irrational to impose a device that is becoming less relevant as a surrogate for actual jurisdiction simply because it could be understood.⁴¹

The Plan cites, as grounds to authorize the Commission to adopt a strict number-based rule for all traffic, the fact that the Commission has always in the past used proxies to determine the geographic location of a party. The Plan also discusses the fact that there are disputes within the industry regarding the geographic end points of certain types of traffic (*e.g.*, VoIP and CMRS). The Plan misses the point. Proxies make sense when they are reasonably related to what they are intended to represent. But numbers are increasingly less related to geography, and

³⁸ When numbers from NXXs assigned to the local calling area were assigned only to users in the geographic area it was a reasonable proxy to use NXXs to represent the local calling area. However, as carriers (most notably those serving ISPs) started assigning numbers from those NXXs to users outside of that local geographic area, the value of the NXX as a proxy for the local calling area deteriorated.

³⁹ See, *e.g.*, *In the Matter of Thrifty Call, Inc. Petition for Declaratory Ruling Concerning BellSouth Telecommunications, Inc. Tariff* F.C.C. No. 1, CCB/CPD File No. 01-17, Declaratory Ruling, 19 FCC Rcd 22240, 22242-44 ¶¶ 5-11 (2004).

⁴⁰ See, *e.g.*, *Illinois Bell Telephone Co. v. FCC*, 883 F.2d 104, 114-15 (D.C. Cir. 1989).

⁴¹ The analogy of looking for one's lost car keys under the street light because the light is better there, rather than where the keys were lost, comes to mind.

the Plan does not contain any mechanism for correcting the “proxies” (*e.g.*, the factoring built into many tariffs and contracts). Accordingly, numbers would not simply be a proxy for geography. Instead, geography would be eliminated from the process altogether. This result would be contrary to past Commission precedent and arbitrary and capricious.

The Plan’s number rule is also a bad idea. The Plan maintains distinctions between access and non-access traffic and between interstate and intrastate access traffic. The current system uses numbers as an initial proxy for determining the type/jurisdiction of traffic but allows carriers to avoid incorrect billing where numbers do not accurately reflect geography by using factoring. The Plan replaces that with a system by which numbers without any correction method are to be used to determine the jurisdiction and/or nature of traffic. However, numbers already increasingly fail to accurately indicate location and are subject to manipulation and arbitrage, and this trend is certain to increase. Indeed, it will no doubt increase exponentially if the Commission implements a rule by which numbers are the sole factor in determining jurisdiction (*e.g.*, intrastate or interstate) and type of traffic (*e.g.*, access or non-access). Carriers will have additional incentive to game the system by expanding ways to use numbers so as to artificially skew the intercarrier compensation in their favor.

In other words, the Plan’s proposed numbers rule will only continue and, indeed, intensify the arbitrage problems that any intercarrier compensation reform plan must eliminate. Among other things, the proposed system will likely impose substantial new arbitrage costs on carriers. For example, in the VNXX context the Plan’s numbers rule would now require that Qwest forego originating access charges and instead pay reciprocal compensation on traffic that is not local simply because numbers are chosen so as to make it appear local. Other arbitrage scenarios lurk in the wireless arena where numbers often do not indicate the actual location of a

caller or where carriers may associate numbers with the physical location of the switch or the cell tower as opposed to the customer location.

F. The Plan's Proposed Resolution Of Wireless Traffic And The Intra-Major Trading Area ("MTA") Rule Fails.

The provisions of the Plan dealing with compensation in connection with the exchange of wireless traffic among carriers and, by extension, the Plan's proposed handling of the intra-MTA rule are also problematic. As discussed more fully below, the Commission should simply eliminate the intra-MTA rule as part of any intercarrier compensation reform. However, in the event it did not eliminate the intra-MTA rule and did take action on the Plan, several aspects of the Plan dealing with wireless traffic must be clarified and/or revised.

By way of background, the intra-MTA rule provides that the local service area for calls originating on or terminating on CMRS networks is the MTA. It thus treats CMRS carriers and other carriers differently for reciprocal compensation purposes. The Commission, in the *Local Competition Order*, established this rule based on the following rationale:

Because wireless licensed territories are federally authorized, and vary in size, we conclude that the largest FCC-authorized wireless license territory (*i.e.*, MTA) serves as the most appropriate definition for local service area for CMRS traffic for purposes of reciprocal compensation under section 251(b)(5) as it avoids creating artificial distinctions between CMRS providers.⁴²

However, while this definition may avoid creating distinctions among CMRS providers, it discriminates against landline carriers and creates the rate disparity and resulting problems described above and below.

Even if the Commission were to adopt the Plan, it should eliminate the intra-MTA rule and thereby eliminate a host of CMRS-specific compensation problems as Qwest and other carriers have advocated in the past. The Commission should simply rule that for intercarrier

⁴² *Local Competition Order*, 11 FCC Rcd at 16014 ¶ 1036.

compensation purposes, the local service area for CMRS-LEC traffic is the same area as it is for LEC-LEC traffic -- the ILEC local calling area. In other words, carriers would determine the jurisdiction/type of CMRS calls using the same rules as for non-CMRS calls.⁴³ If the Commission is to eliminate arbitrage opportunities and unnecessary disputes, litigation, etc., it must eliminate asymmetrical carrier-specific rules such as the “intra-MTA rule” for intercarrier compensation purposes.

Assuming the intra-MTA rule were to continue as part of any intercarrier compensation reform, the Plan’s handling of the implications of the rule are problematic. By way of example, the “Wireline LEC-to-CMRS traffic” provisions on page 29 of the Plan, include, among other things, an apparent prohibition on 1+ dialing (Section II.D.3.b.ii.2) at least under certain circumstances, and an apparent prohibition on the use of an interexchange carrier (“IXC”) for certain LEC-CMRS traffic (Section II.D.3.b.ii.3), at least under certain circumstances. However, the intended scope of these provisions is not at all clear and, as a result, the provisions could potentially be argued to preclude legitimate practices with respect to LEC-CMRS traffic. Because of the ambiguous language, it is difficult for Qwest or any party to comment intelligently on these provisions. Should the Commission ever take action on the Plan, the language of Section II.D.3.b.ii must be further vetted.

The Plan also may be read to impose on terminating carriers a new obligation to differentiate, on a call-by-call basis, at the terminating end between intra-MTA and inter-MTA CMRS-originated traffic regardless of the type of carrier that hands the traffic to the terminating carrier. This can not presently be done, would reverse years of industry practice and would

⁴³ The Commission should also eliminate the disparities that exist, in some LATAs between the defined local calling areas of ILECs and competitive local exchange carriers (“CLECs”) for intercarrier compensation purposes.

require extensive and costly systems changes for Qwest and many other carriers.⁴⁴ Notably, this is yet another problem that would be eliminated should the intra-MTA rule be eliminated as discussed above.

G. The Plan's Transit Service Proposals Are Flawed.

The Plan would also dramatically change the rules governing transit service (*i.e.*, the carriage of non-access traffic where the transiting carrier has no end-user relationship) and its corollary in the access world -- jointly-provided switched access ("JPSA") as explained below, both conditionally become transit service under the Plan. Additionally, the Plan would impose new mandatory obligations for certain carriers to provide transit service and would establish non-market rates for transit service.⁴⁵ The proposal would also codify current law providing that in no event is a transit service provider liable for the intercarrier compensation owed to the terminating provider for traffic that the transit service provider delivers.⁴⁶

As with many aspects of the Plan, the treatment of a carrier's JPSA varies depending upon the category of the carrier. For Track 1 and Track 2 carriers, both jointly-provided

⁴⁴ Carriers must be able to correlate their billing systems with the type of carrier that is delivering traffic for termination. Carriers have invested considerable resources to develop these systems. The Plan seems to ignore all of this and assume that traffic will be billed according to the Plan's differentiated billing schemes regardless of the type of carrier terminating the traffic. It thus "throws the baby out with the bathwater" -- at a potentially mammoth cost to the industry and individual carriers. For ILECs like Qwest, the Plan would require costly systems changes, indeed probably a complete revamping of billing systems and potentially national routing tables that, for decades, have been designed to serve feature group service, local interconnection services and CMRS interconnection services. Indeed, it is difficult to imagine how to design billing systems to accommodate all the various permutations of traffic, carrier-types and tracks envisioned by the Plan.

⁴⁵ Missoula Plan at 49.

⁴⁶ *Id.* at 51. Qwest understands this aspect of the Plan to define terminating provider to be the called party's carrier. In other words, the proposal codifies current law providing that in no event is a transit service provider liable for the non-access or access charges applicable when it hands traffic for termination to the terminating provider. This proposal does not address other transit compensation issues.

originating access/tandem switched transport (tandem switching and common transport for Track 1 and Track 2 carriers that have elected to eliminate originating switched access charges) and jointly-provided terminating access/tandem switched transport are deemed “Tandem Transit Service” under the Plan at Step 4.⁴⁷ As a result, the current distinction between the treatment of intermediate tandem functionality when provided in connection with access traffic (jointly provided switched access) and the treatment of intermediate tandem functionality provided in connection with local traffic (transiting) is eliminated for these carriers. Also, for Track 1 and Track 2 carriers who have not elected to eliminate originating switched access charges, tandem switched transport remains subject to access tariffs.⁴⁸ On the other hand, Track 3 carriers who own tandems are never required to convert their jointly-provided tandem switched transport for access traffic to the Plan’s Tandem Transit Service.⁴⁹

Not all of the transiting provisions in the Plan are flawed. For example, the Plan’s codification of current law providing that transit providers are not responsible for the intercarrier compensation for the traffic they deliver is positive and should be adopted in any plan.

On the other hand, the Plan’s transiting provisions have numerous defects, first and foremost the proposed requirements that ILECs provide transit services and the establishment of non-market rates for the provision of transiting.

As Qwest and other carriers have demonstrated in past comments in this proceeding,⁵⁰ the Act simply does not create a carrier LEC obligation to provide transiting as an offering to the public. Instead, the provisioning of transiting is an interconnection service subject to Sections

⁴⁷ *Id.* at 54.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *See, e.g.,* Qwest’s May 23, 2005 Comments at 38-40.

201 and 202 of the Act, and is subject to the rules related to common carrier services offered to the public. Interconnection between carriers under these circumstances is not presumed under the Act and can only be ordered after notice and a hearing as required under Section 201(a) of the Act.⁵¹ While there might be instances where a carrier could demonstrate a legally sustainable factual case necessary to allowing the Commission to compel transiting under the Act, those circumstances will be very limited, and are not subject to a universal requirement. Certainly, the record does not support a general rule on transiting requiring that it be provided on a universal basis at regulated rates.

Similarly, there is no legal basis for the Plan's use of a non-market-based pricing methodology for transiting. The Commission should allow the market to establish transiting rates and those rates should be deemed reasonable absent a showing to the contrary on a case-by-case basis.⁵² Intercarrier contracts are the optimal means for establishing transiting relationships. Qwest and other carriers have demonstrated unequivocally in prior filings that there is no legal basis for applying Total Element Long Run Incremental Cost ("TELRIC") or any other non-market-based pricing to transit services.⁵³

⁵¹ See *AT&T Corporation v. FCC*, 292 F.3d 808, 812-13 (D.C. Cir. 2002).

⁵² As in the case of carrier interconnection and transport on the terminating carrier side of the edge, described above, a more interventionist regulatory scheme can be crafted for transiting pricing. Indeed, as in that context, the Plan has proposed such a rate scheme for transiting. However, in the transiting context, Qwest encourages the Commission to, in connection with any intercarrier compensation reform, begin with a market-oriented approach based merely on the designation of the edge as the default financial point of interconnection ("POI") and the express imposition on the originating carrier of the obligation to compensate the transit service provider where an originating carrier utilizes a transit service provider to transport traffic from its network to the edge of the terminating carrier -- before employing a detailed regulatory scheme. Such an approach will maximize the incentives for carriers to negotiate efficient arrangements and, where appropriate, construct new facilities. The Commission can always, at a later date, implement a more targeted, interventionist approach -- *i.e.*, only where necessary and only after further study.

⁵³ Qwest's May 23, 2005 Comments at 38-39.

In addition to being legally questionable, the Plan's use of a non-market-based pricing methodology is also a bad idea. Transit service providers accomplish the transport of traffic between carriers who have chosen to have indirect connections. They are not providing a service to an end user and, in fact, have no end-user customer involved in the traffic they transit from whom they can recover the costs of the services that they provide. They are entitled to fair, market-determined compensation for the transiting service that they provide. Additionally, mandating an arbitrary transit rate removes the ability of the marketplace to determine the most economic means of transporting traffic. Moreover, any non-market-based pricing brings the industry backwards to artificial regulatory burdens reminiscent of failed concepts like TELRIC that are unnecessary in competitive markets. For example, the "Traffic Volume Limitations" provisions concepts discussed at Section III.D.5 of the Plan would give transit service providers the ability to charge higher rates for volumes above a defined threshold. However, this proposal would impose confusing and overly complicated requirements that current billing systems and carrier relationships do not account for.⁵⁴ This only assures more years of costly arbitrage, carrier disputes and litigation. The proposed rules for "Congestion and Exhaust" set forth at Section III.D.6 impose vague rules that could invite similar problems.⁵⁵ That section would, among other things, appear to create situations where the network would become congested to unacceptable levels. All of these issues are better handled by using industry-recognized traffic engineering concepts and by the market, rather than by arbitrary and artificial regulatory mechanisms.

Finally, as described above, the Plan creates the possibility of the anomalous situation that, in a given JPSA scenario, one party may have eliminated originating access while another

⁵⁴ Missoula Plan at 52.

⁵⁵ *Id.* at 53.

has not. This also creates a need for system redesign because it would require a call-by-call analysis per carrier to determine which calls were subject to switched access and which are not. All of this programming would have to be accomplished on a carrier-by-carrier basis that would be constantly changing. The Plan also does not specify what will happen in terms of intercarrier compensation when the transit service provider is a LEC and has elected not to have originating switched access.

H. The Proposed Phantom Traffic Solution Also Fails.

The Plan also proposes a “Comprehensive Solution for Phantom Traffic.”⁵⁶ In it, the Plan establishes call signaling rules which specify signaling information that must be included in call traffic at origination, with distinct obligations depending upon whether the originating provider uses Signaling System 7 (“SS7”) signaling protocol or multi-frequency (“MF”) signaling. The rule then, in essence, requires that any intermediate carriers in the call path transmit without alteration what they receive in the automatic numbering information (“ANI”), ANI II, calling party number (“CPN”), called number (“CN”) or Jurisdictional Information Parameter (“JIP”)

⁵⁶ Phantom traffic describes a number of situations in which the traffic is delivered to a terminating carrier in a manner that makes appropriate billing impossible. This includes, by way of example, terminating access traffic that has been erroneously designated as interstate when in fact it is jurisdictionally intrastate *or* long distance traffic that has been erroneously designated as local traffic. The latter includes VNXX, where carriers misrepresent long distance traffic as being local in order to avoid the access charges applicable to such traffic. As discussed above, one of the main flaws of the Plan’s proposed numbering rules is its apparent attempt to legalize the efforts of carriers to perform this particular type of arbitrage. Qwest opposes this change in the law. Moreover, as Qwest and other parties have said in prior filings, the Commission must focus urgently on all aspects of the Phantom Traffic problem, including but not limited to VNXX. The Commission could address this problem through comprehensive reform in the Intercarrier Compensation and IP-Enabled Services dockets. Qwest urges the Commission to act as soon as possible in these broader proceedings as piecemeal relief is often less effective. In the meantime, however, the Commission should act where it can -- *i.e.*, through the relief described in Qwest’s prior filings on Phantom Traffic in this docket and in dockets such as the one established for the SBC/VarTec petitions dealing with the application of access charges to IP transported calls, WC Docket No. 05-276.

fields according to those rules.⁵⁷ The Plan proposes certain “technological exceptions” to these call signaling rules.⁵⁸ The Plan also excludes various categories of traffic from the rules applicable to originating carriers and grants certain exceptions to the obligations of intermediate carriers.⁵⁹ Additionally, the Plan establishes a procedure allowing providers to seek future exceptions based on “legitimate technological limitations” *and* proposes special enforcement procedures be established to address complaints to the Commission alleging violations of the proposed signaling rules.⁶⁰ The latter clarifies that in no event shall an intermediate provider be required to block traffic from providers who violate the rules.⁶¹

The Phantom Traffic proposal also includes a proposal for an “industry-driven framework with a Commission-imposed deadline” for dealing with the issue of the generation and exchange of call-detail records. Specially, the Plan calls for an industry proposal to be prepared and filed within 60 days after the filing of a Comprehensive Plan. The Plan states that any industry solution must include certain specific characteristics, including:

- a requirement that a tandem service provider provide call-detail records to other intermediate and terminating carriers without charge; and
- a requirement that originating providers, in turn, provide call-detail records to tandem transit providers “if the tandem service provider requires such records to satisfy its obligations to exchange call detail records to terminating providers.”⁶²

Finally, the Plan also calls for the Commission to issue an interim Phantom Traffic order that immediately implements the call signaling rules, confirms that originating carriers must pay

⁵⁷ Missoula Plan at 56-57.

⁵⁸ *Id.* at 57.

⁵⁹ *Id.* at 58.

⁶⁰ *Id.* at 58-59.

⁶¹ *Id.* at 59.

⁶² *Id.* at 60-61.

for applicable intercarrier charges, and establishes an interim process with respect to the provision of call-detail information. The latter is to include a proposed requirement that originating carriers provide call-detail information (again, “if necessary”) to tandem transit providers. Transit service providers are to be required to supply call detail information to terminating carriers and intermediate carriers. Additionally, originating carriers must, until the issuance of a final order on intercarrier compensation reform, compensate tandem transit service providers \$.0025 per record when a tandem transit provider supplies records to terminating carriers.

As with the transit proposals in the Plan, discussed above, certain aspects of the Phantom Traffic proposal have merit. For example, Qwest supports the basic requirements as proposed for call signaling information for originating and intermediate providers that require, in essence, the passing of CN/CPN information for traffic where SS7 signaling is used and the passing of ANI information when MF signaling is used.⁶³ The Plan also correctly makes clear that intermediate providers shall have no obligation to police the exchange of traffic or to block traffic of providers that do not comply with the call signaling rules.⁶⁴

On the other hand, however, the proposed Phantom Traffic solution suffers numerous fundamental flaws. First, the signaling rule requirements are flawed. Among other things, due

⁶³ Qwest also supports the proposed requirement in the Plan that intermediate carriers pass on JIP when they receive it in the signaling stream for a given call. As Qwest has stated in prior filings, where SS7 signaling is used, Qwest is also comfortable with a requirement that originating carriers populate the JIP per industry signaling standards -- *i.e.*, in addition to populating either CPN or CN. While JIP is not necessarily determinative of jurisdiction in all circumstances, the provision of JIP simply gives carriers another billing tool. If JIP is included as a mandatory parameter, the Commission should clarify that this requirement does not make JIP determinative of the jurisdiction of a call in all cases. Indeed, CPN and CN also may not be determinative of jurisdiction in all cases.

⁶⁴ The Commission should, in any plan that it approves, make this unequivocally clear. It should not leave this as a statement in the enforcement section, as the Plan does, but make this explicit when defining the obligations of intermediate providers.

to the need to address technical limitations or exceptions, there is a potential that the rules proposed under the Plan will be abused. In order to help prevent this, the Commission must provide some clarification.⁶⁵ For example, the exceptions created for MF equipment must be qualified to make clear that the exceptions apply only to traffic transported over existing MF equipment for legitimate routing needs. In other words, carriers should not be able to deploy new MF equipment or insert an MF leg as part of a transport route and thereby avoid the more stringent signaling requirements that apply to SS7 traffic. Additionally, the rules should state explicitly what they imply with respect to intermediate carriers -- *i.e.*, that intermediate carriers have no obligations with respect to signaling information population except to pass on what the originating provider gives them in terms of the required signaling parameters.

The Plan's provisions with respect to call-detail records are particularly problematic -- both the permanent and the interim aspects of those provisions. Again, it must be kept in mind that the Plan would, for the first time, impose on large ILECs, such as Qwest, a new mandatory obligation to provide transit service.⁶⁶ Accordingly, to be clear, when the Plan places burdens on transit service providers, they will fall most heavily on those same large ILECs who, under the Plan, would also now have no choice but to provide this service. In this light, the imposition upon these transit service providers of the ultimate burden of providing call-detail records is fundamentally unfair. The Plan makes an arbitrary choice to not require terminating carriers to invest in equipment and systems that they could employ to routinely record the SS7 signaling data and create their own call records of traffic that terminates to their switches. Terminating

⁶⁵ See, *e.g.*, Qwest Feb. 3, 2006 *ex parte*, CC Docket No. 01-92 at 5-6 (discussing important clarifications for technology exceptions to signaling stream rules).

⁶⁶ In these scenarios, the terminating carriers are independent telephone companies ("ICOs"), CMRS providers or CLECs and the originating carriers are either other ICOs, CMRS providers or CLECs.

carriers (either alone or as part of a consortia of ILECs) could invest in and develop their own SS7 recording capabilities. However, under the Plan, the smaller LECs are able to foist onto transit service providers their costs to obtain the data they need to bill their charges.

The proposed treatment of originating carriers and call-detail records fails to alleviate any of these ultimate burdens placed upon transit service providers. The Plan includes a proposed requirement that originating carriers provide such records without charge to a tandem transit provider to which it routes traffic. However, this obligation is apparently qualified so that the originating carrier need only provide such records “if the tandem transit provider requires such records to satisfy its obligations to exchange call-detail records with terminating providers.”⁶⁷ While the language is somewhat vague on this point, this originating carrier record obligation is therefore apparently an equivocal or conditional one. In other words, the Plan could be argued to provide that only transit service providers have an unconditional obligation to provide such records and they must incur the implementation costs and provide those records to the terminating carrier and do so without any compensation for that service. If so and if, for whatever reason, terminating carriers do not receive records, the Plan apparently places that problem squarely on the shoulders of the transit service provider. Even in the event that originating carriers provided records to transit providers, under this arguably conditional originating carrier records obligation, those records would be of little help. Transit service providers currently have no ability with their current systems to pass any records provided by originating carriers to terminating carriers. Thus, in order to make use of any records that originating carriers may provide, transit service providers must design and implement expensive new systems to get the records to terminating carriers.

⁶⁷ Missoula Plan at 61; *see also id.* at 61-63.

Qwest reiterates its prior advocacy that the solution to the problem of terminating carriers needing to identify the responsible billing party for traffic terminated to it by transit providers is not to impose an obligation on transit service providers to provide call-detail records. Among other things, transit service providers do not typically have the capability to assure the identity of the originating carrier for traffic which they transit.⁶⁸ Like so many aspects of the Plan, this requirement that transit service providers identify, for any given call, the originating carrier or the carrier providing the traffic to the transit service provider, ignores the realities of industry practices and systems that have been in place for decades. Transit providers typically have only the information provided to them in the signaling stream. This information may or may not be adequate to permit the transit service provider to identify, on a call-by-call basis, either the originating carrier or the carrier that handed the transit provider the traffic. Instead of arbitrarily imposing the costs of the solution to this “identification problem” on transit providers, the Commission should simply clarify that all carriers exchanging local traffic have the ability and the obligation to enter into agreements to cover such exchange of traffic and services.

Qwest, therefore, supports the general concept stated in the Plan that “each carrier -- regardless of its type or classification -- can obtain an agreement setting forth the terms of interconnection and reciprocal compensation...”⁶⁹ Qwest does not support the new agreement process set forth in the Plan.⁷⁰ Instead, Qwest asks that the Commission simply clarify that

⁶⁸ Despite this, the Plan’s interim proposal for Phantom Traffic will apparently place the burden on the transit service provider, alone, to supply information regarding “the identity of the provider that sent the traffic to the transit service provider.” *Id.* at 62.

⁶⁹ *Id.* at 54.

⁷⁰ Section IV.A of the Plan proposes that carriers have the ability to establish interim interconnection with an originating carrier for the termination of its non-access traffic through indirect interconnection by a notification procedure. *Id.* at 54-55. Section IV.B extends to all carriers the negotiation and arbitration procedures set forth in Section 252 of the Act.

existing law already provides for agreements as Qwest and others have advocated in the past.⁷¹ Specifically, the Commission should clarify that any carrier can, regardless of its type or classification, obtain an agreement setting forth the terms of interconnection and reciprocal compensation under existing law. Though all such agreements may not be subject to Section 252 of the Act, the Act does already facilitate the accomplishment of agreements between all carriers that exchange traffic either directly or indirectly and any carrier (*e.g.*, ILECs, CLECs and CMRS carriers) has the right to demand such negotiations with any other carrier as a condition of exchanging traffic.⁷²

In any event, agreements are clearly the best method of addressing complaints by terminating carriers that they are unable to identify responsible carriers in the transiting context. Claims of an “inability” to identify a responsible carrier typically arise where an identified carrier disputes responsibility or where terminating carriers must expend resources to look to available data to identify a responsible carrier (*e.g.*, in the Local Exchange Routing Guide (“LERG”)). An intercarrier agreement would permit the parties to address these issues, including specification of how and when information is exchanged.

At bottom, the underlying policy question here is whether terminating carriers should be able to pass this and other burdens relating to Phantom Traffic to transit service providers or should assume it themselves. The Commission should clarify that terminating carriers must obtain any billing information they need -- beyond the required signaling stream information described above -- directly from originating providers, by utilizing their own resources or by negotiation with intermediate/transit carriers. As discussed above, transit carriers have no end user involved in the traffic at issue and therefore have no source for compensation for transiting

⁷¹ See, *e.g.*, Qwest Mar. 23, 2006 *ex parte*, CC Docket No. 01-92.

⁷² *Id.* at 4.

routing or recording services other than the payment by originating providers. Transit carriers currently, when they provide call-detail records, provide them to terminating carriers.

Additionally, some transit providers currently do not make all the recordings that would be required to create call-detail records for all call types. This is yet another way in which the Plan's call-detail record proposals effectively single out transit service providers and impose a huge systems change requirement involving considerable expense without providing any opportunity to recover the investment.⁷³ Add to this burden the fact that different obligations would apparently apply to transit providers during the transition and it is clear that the Plan's Phantom Traffic rules are fundamentally unfair.

I. The Proposed 8YY Implementation In The Plan Is Also Fundamentally Flawed.

The Plan would also accomplish a fundamental shift in the law governing intercarrier compensation for 8YY traffic. The Plan specifies that some of 8YY traffic would be deemed non-access, depending upon an examination of the calling and called party plain old telephone service ("POTS") numbers.⁷⁴ Currently, all 8YY traffic is both functionally and legally access traffic. Thus, this is yet another aspect of the Plan that will stand current law on its head. To set aside the law, which clearly defines 1+8YY calls as access, for a small segment of 1+8YY calls where the calling and called parties are local to each other is a needless complexity in the Plan.

⁷³ At the very least, should transit providers be required to provide call-detail records, the new compensation regime must provide expressly for payment to compensate the transit provider for the cost incurred in accomplishing that function. As currently framed, the Plan expressly provides that, under any permanent call records proposal, transit providers would not be compensated. In other words, the Plan would mandate that transit service providers provide call records and provide them for free. Only the interim aspects of the call records proposals call for compensation to the transit provider and the proposed rates therein are wholly inadequate to cover the costs involved. Both create an absurd result. If, in the end, transit providers must provide call-detail records, they must be compensated and compensated fairly for that function.

⁷⁴ See Missoula Plan at 26-27.

Additionally, this is yet another aspect of the Plan that would require major billing system changes. In fact, this proposal may very well be impossible to implement as the POTS (or called) number is not currently captured or relevant in 8YY access billing.

J. Information Service Access Provisions Are Flawed.

The Missoula Plan treats traffic delivered to and from ISPs as a phenomenon that exists solely when the delivery is between carriers. ISPs would continue to be treated as end users when purchasing service directly from a carrier. Under the Missoula Plan, when one carrier hands ISP traffic to another carrier for termination, the call will be treated as reciprocal compensation or access based on whether the called and calling numbers are found within the same local calling area. However, this determination will be made, under the Missoula Plan, based solely on telephone numbers, not actual location. When the local calling areas associated with the called and calling numbers are different, ISP traffic exchanged by carriers is treated as access traffic and billed to the proper carrier accordingly.⁷⁵ Though the real import and the long-term implications of continuing a structure that distinguishes between access and reciprocal compensation are significant (and to some extent are eliminated in the Missoula Plan in the long run), Qwest sees the Missoula Plan's approach as differing from the current rules only insofar as the Missoula Plan uses assigned numbers for this determination, rather than the physical location of the ISP POP. As discussed above, the use of numbers instead of location would create significant problems, but Qwest does not object to continuation of the "ESP exemption," properly interpreted and applied, for a short while to allow for long-term implementation of

⁷⁵ When an ISP is the customer of a carrier, the ISP does not pay access charges when it calls a distant local calling area. Instead it pays toll charges and its carrier pays the appropriate access charges.

comprehensive intercarrier compensation reform. Of course, as is discussed below, it is vital that the “ESP exemption” be properly interpreted.

K. The Plan’s Provisions Regarding VoIP Are Flawed.

While somewhat ambiguous, Qwest sees the Missoula Plan as treating VoIP service in a manner that is similar to, but not identical to, the proper treatment under the rules as they exist today (although it is apparent that rampant confusion in this area has resulted in multiple interpretations and applications of the access charge rules with regard to VoIP service). Qwest interprets the current rules as simply applying the ESP exemption rules to VoIP POPs. If the call to the VoIP POP is a local call (based on location, not number), then it is treated as local.

The Missoula Plan treats VoIP service as subject to the reciprocal compensation or access rule by comparing the numbers of the called and calling parties, which is consistent with its treatment of ISP-bound traffic as noted above. However, unlike the case of other information services,⁷⁶ in the Missoula Plan the number used for this analysis in the case of VoIP is not the local number of the primary rate interface (“PRI”)⁷⁷ that connects the VoIP provider POP to the local exchange (of the non-VoIP customer). Instead, the Missoula Plan’s relevant number is the number assigned to the VoIP customer, which is only a convention because the actual “address” of the VoIP customer will be an IP address, not a telephone number at all. Thus, as we understand it, a VoIP customer located in local calling area A assigned a number in local calling area B placing a call to another entity in local calling area A via a VoIP provider utilizing a PRI with a number assigned to local calling area A will in fact be making an access call, as defined by the Missoula Plan, not a reciprocal compensation call (assuming, of course, that the call is

⁷⁶ Qwest treats VoIP as an information service. The Commission thus far has declined to take a position on this issue.

⁷⁷ Generally VoIP POPs are connected to local networks via ISDN PRI services.

routed through more than one LEC). While Qwest has long had difficulties with the ESP exemption and its potential for abuse (*see* next section), Qwest can find no rationality for treating IP voice services differently from other information services in applying the ESP exemption. The physical location of the ISP POP involved in delivering or receiving IP voice service to a customer forms the predicate for access charge evaluation, not the pseudo-POTS number assigned to the VoIP customer.

The Missoula Plan would create another significant anomaly by classifying all IP voice traffic as interstate for access charge purposes.⁷⁸ Thus, when a VoIP call identified by the assigned calling number as an intrastate access call is delivered to an ILEC for termination, the ILEC would be required to assess interstate, rather than intrastate, access charges. Leaving aside whether such an approach makes sense, ILEC systems are not constructed to bill calls that are intrastate based on calling number as interstate because they are VoIP calls. Moreover, as the Missoula Plan makes the determination of whether a VoIP call is an access call or a reciprocal compensation call by comparing the assigned calling number and the actual called number, declaring the number to be irrelevant in determining the jurisdiction of the call for access purposes is inconsistent with the initial call classification. In all events, Qwest perceives no reason to treat VoIP calls any differently than other information service calls during the transition period to comprehensive reform.

L. Rationalizing The ESP “Exemption” Is A Critical Step In Any Approach To Intercarrier Compensation.

The disparity between reciprocal compensation traffic and access traffic in the current regulatory environment and the serious dangers they pose is perhaps most strikingly illustrated by the so-called ESP exemption from switched access charges. No matter what the Commission

⁷⁸ Missoula Plan at 30.

does with the Missoula Plan or with the overall issue of intercarrier compensation reform, it is vital that the Commission provide clarity and guidance on the proper interpretation of the ESP exemption. It is not, as some claim, a blanket invitation to arbitrage, and it is important that the Commission clarify what the ESP exemption means, and how it is to be applied pending ultimate intercarrier compensation reform.

The ESP exemption, which in fact is nothing more or less than the right of an ESP/ISP POP to be treated in the same manner as a “leaky PBX” when accessing the local network, began in 1983 when it was established by the Commission as a “temporary” regulatory benefit to the then-fledgling ESP industry.⁷⁹ The fact that it still exists today is a testament to the false optimism that so often drives efforts to grant “temporary” regulatory benefits to any class. The ESP exemption creates, and has created, huge arbitrage opportunities, both because of its terms, and because of the penchant of some to derive additional benefits not contemplated by the original rules. Moreover, it cannot possibly provide a rational solution to today’s information access questions, as it was developed in 1983 well prior to the explosion of Internet technology. But it is considerably more limited than aggressive carriers often concede, and clarification is in order.

The ESP exemption itself is simple, at least when properly applied. All it does is treat an ISP/ESP POP⁸⁰ like a PBX. In implementing the initial access charge regime, the Commission recognized that PBXs could “leak” interstate long distance traffic that could not be measured or identified into local exchange networks, and established specific rules to govern such “leaky

⁷⁹ *In the Matter of MTS and WATS Market Structure*, Memorandum Opinion and Order, 97 FCC 2d 682, 715-16 ¶ 84 (1983).

⁸⁰ Qwest uses the term “ESP” here because of the derivation of the ESP exemption. The term encompasses ISPs as well.

PBXs.”⁸¹ These same rules apply to ISP/ESP POPs. An ISP/ESP POP is entitled to the same access treatment as a PBX located in the same place. The scope of the ISP/ESP POP and the PBX’s local access rights is identical. Specifically, if a PBX or an ISP/ESP initiates a call to a customer in another local calling area, it will be assessed a toll charge. If a PBX or an ISP/ESP initiates or terminates a long distance call over the facilities of a carrier (including its own carrier facilities if the ISP/ESP is a carrier), the access charges to be assessed are the same in both instances.

If a PBX or an ISP/ESP POP is connected to a local exchange via a CLEC, the identical analytical framework also applies -- the traffic is access traffic or reciprocal compensation traffic based on the locations of the PBX or ISP/ESP POP and the other party to the call. In those cases where the CLEC also operates as an IXC, the CLEC must pay the proper tariffed access charge based on tariffs of the ILEC. There is no magic to this analysis -- it simply requires that the ESP exemption’s actual meaning be applied consistently.

Unfortunately, many providers of information and enhanced services have attempted to transmogrify this simple rule into a blanket exemption for ISP/ESP traffic, one that says that, when a carrier carries ISP/ESP traffic, that carrier is “exempt” from the payment of access charges to originating or terminating LECs, regardless of the location of the called and calling parties.⁸² There is no such content-based exception from the normal rules regarding intercarrier payments for origination and termination of traffic.

⁸¹ A “leaky PBX” is connected to an interstate special access line, and enables calls to and from the local exchange to pass through the PBX and be connected directly to an IXC POP rather than through a local exchange carrier access facility.

⁸² Qwest has raised this issue before in previous submissions in this and other dockets. *See, e.g.*, Qwest’s May 23, 2005 Comments at 14, n.27.

Qwest submits that the foregoing explanation of the ESP exemption is accurate and binding on carriers and ISPs/ESPs alike. Definitive clarification by the Commission to this effect is an important step in the overall intercarrier compensation effort, although admittedly not a substitute for comprehensive reform.

The Missoula Plan deals with this issue by incorporating ISP traffic into the overall intercarrier compensation scheme in an odd way. The ESP exemption is retained, but evaluation of the classification of a call to or from an ISP/ESP POP is to be based on the calling and called telephone numbers rather than the ISP/ESP POP location. Thus, the ESP exemption is expanded to include VNXX traffic within its ambit, something which is not appropriate. The potential for a repeat of the disastrous “ISP reciprocal compensation” fiasco facially (but unsuccessfully) is ameliorated by special rules regarding “out-of-balance traffic.” The initial rates for “ISP reciprocal compensation” would be those established pursuant to the *ISP Remand Order*,⁸³ but at Stage 3 of the Plan implementation, those rates would be folded into the overall unified termination rates, and originating rates would continue to be treated under the terminating transitional rule.

1. ESP Exemption Based On Numbers.

Initially, the proposal in the Plan to evaluate ISP/ESP traffic based on numbers, rather than ISP/ESP POP location, must be rejected. Information services are even less geographically tied to numbers than are voice services, and the initial VNXX cases have all involved ISPs. Use of numbers in evaluating information access (access afforded to carriers serving ISPs/ESPs as well as access to ISPs/ESPs themselves) instead of actual location would be irrational and would potentially constitute a huge invitation to arbitrage.

⁸³ *ISP Remand Order*, 16 FCC Rcd at 9186-88 ¶¶ 77-80.

2. Out-Of-Balance Traffic.

The Missoula Plan identifies the issue of “out-of-balance” traffic, which the Plan defines as traffic with a ratio of more than 3:1 terminating traffic versus originating. Such traffic is presumed to be ISP traffic.⁸⁴ The Missoula Plan requires that a carrier with out-of-balance traffic with another carrier (terminating in its direction) pay for all transport costs in both directions between the two carriers. The 3:1 ratio appears to derive from the Commission’s rules initially adopted in the *ISP Remand Order*⁸⁵ that found that all traffic in excess of that ratio was presumptively ISP traffic, and was subject to the rules adopted in that *Order* and subsequent *Orders*.

In the Missoula Plan, out-of-balance traffic is likewise identified on a presumptive basis as traffic in excess of a 3:1 ratio in one direction.⁸⁶ However, rather than singling out ISP traffic for special rates (although the existing ISP “reciprocal compensation rates are retained under the Missoula Plan), the Missoula Plan deals with out-of-balance traffic differently, requiring that the creator of the out-of-balance traffic (presumably the terminating carrier) pay all costs of transporting all traffic in both directions between the two carriers. This approach is designed to eliminate (or at least reduce) the perverse incentive for a CLEC to sustain lopsided traffic imbalance.

⁸⁴ Missoula Plan at 40-41.

⁸⁵ See *ISP Remand Order*, 16 FCC Rcd at 9186-92 ¶¶ 77-87.

⁸⁶ The growth cap and new market rules were subsequently eliminated. *Id.* at 9181-86 ¶¶ 67-76; and see *Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Application of the ISP Remand Order*, Order, 19 FCC Rcd 20179, 21087-88 ¶ 24 (2004), *pet. for review denied*, *Core Communications Inc. v. FCC*, 455 F.3d 267 (2006), *reh’g denied*, 2006 U.S. App. Lexis 25686 (D.C. Cir., Oct. 13, 2006), *mandamus dismissed*, 2006 U.S. App. Lexis 16850 (D.C. Cir., June 30, 2006) (“*Core Forbearance Order*”).

While well-intentioned, Qwest submits that this disincentive is not sufficient to protect against the massive problems that can be created by one way “reciprocal compensation.” It must be remembered that the ISP “reciprocal compensation” facade at its heyday reached into the billions of dollars. Even today ISP traffic (and “reciprocal compensation”) is dramatically out of balance -- Qwest, for example, delivers approximately 6 billion minutes of traffic to CLECs each month, while terminating only approximately 1 billion minutes of CLEC traffic. This phenomenon is caused by the arbitrage opportunities available on account of “one way reciprocal compensation.” While assessing transport costs on a carrier with out-of-balance traffic could ameliorate a little the arbitrage incentive offered by the one-way traffic opportunity, it is not sufficient to avoid the economic dislocations that such opportunities for abuse of the reciprocal compensation process invite. Qwest supports a firm rule that provides that, so long as payments are mandated between carriers for termination of traffic (and carriers cannot decline to hand such traffic off even if it is uneconomical to do so), ISP traffic (or other one-way traffic that might develop) be exchanged on a bill and keep basis using actual rather than presumptive volumes. The Missoula Plan’s solution is simply not sufficient.

III. IT IS IMPERATIVE THAT THE COMMISSION PROPERLY ADDRESS KEY LEGAL ISSUES THAT COULD DISRUPT THE IMPLEMENTATION OF AN INTERCARRIER COMPENSATION PLAN

As has been previously noted, it is absolutely imperative that the Commission devise a plan for intercarrier compensation that is grounded in solid legal principles. This is true for at least two reasons: 1) Intercarrier compensation is an issue of immediate and vital importance, and attempting to retool a plan after judicial rejection would be a multi-year project that would be inconsistent with the vital need for expeditious resolution of the intercarrier compensation issues, a problem that would be aggravated if carriers had already taken significant steps to

implement the new plan prior to judicial rejection; and 2) Resolution of intercarrier compensation must be accomplished on a “total” basis -- it cannot be done piecemeal. Actions of questionable legality could result in “partial” judicial reversals that could leave the industry in a worse situation than exists even under the current structure. Legal issues that would risk either judicial reversal or a piecemeal approach to intercarrier compensation merit very serious attention.

This is especially important because of the overriding necessity that the plan not deprive carriers of the opportunity to recoup the revenues that a new intercarrier compensation regime would deprive them of or the additional expenses that the new rules would require (by way of additional compensation to other carriers). Of signal importance, if the plan seeks to reduce intrastate switched access rates (which all agree is an absolute necessity), the plan must not leave the opportunity to recover lost intrastate access revenues to the discretion of state regulators. Rather, all carriers must have the opportunity to recoup any revenues that are reduced by virtue of reduction of intrastate switched access revenues, and such recovery opportunity must be embedded in the new regulatory structure itself. The Missoula Plan’s resolution of the intrastate rate issue is laden with significant problems.

Basically, there are three vital issues that have the potential to create the revenue reductions and implementation problems described above:

- While the Commission’s jurisdiction to prescribe a methodology to govern intercarrier compensation under Section 251(b)(5) of the Act is secure, the Commission’s authority to prescribe the actual rates to be charged for transport and termination under Section 251(b)(5) is questionable. This includes the rates for intrastate terminating switched access that would be moved to the intercarrier compensation section of the Act under the

Missoula Plan (Section 251(b)(5)). Prescription of bill-and-keep as a transport and termination methodology does not pose this problem because it does not entail actual prescription of a rate.

- The Commission's authority over intrastate originating switched access is even more questionable, because Section 251(b)(5) applies only to transport and termination.
- The Missoula Plan's proposal that an ILEC can file a petition seeking preemption of a state's rules regarding intrastate originating access in the future (with no hint of what action might be taken with regard to such a petition or when it would be acted upon) leaves too much of the proposed intercarrier compensation plan unresolved and subject to ambiguity and erroneous planning assumptions.

A. Commission Authority Over Transport And Termination Rates.

The Missoula Plan proposes to move all terminating access (interstate and intrastate) into the ambit of Section 251(b)(5) of the Act. That is, terminating access would be viewed as "transport and termination" under that Section of the Act and regulated accordingly. Section 251(g) of the Act preserves existing access charge regulatory structures, both interstate and intrastate, only until the Commission acts to establish a new regulatory regime, and Qwest believes that the Commission has the clear authority to undertake the transfer proposed in the Missoula Plan. That is, all exchange access, interstate and intrastate, originating and terminating, can legitimately be placed within the statutory structure of Section 251(b)(5) and treated as part of transport and termination. While not free from doubt, Qwest submits that the costs recovered through originating intrastate access could be legitimately put within the ambit of the Commission's authority over transport and termination -- but only so long as they are recovered through a termination charge (or via a bill-and-keep mechanism). The Missoula Plan then moves

nominally towards a unitary termination rate for all such transport and termination -- access as well as reciprocal compensation traffic, but does not bring intrastate originating access into the unitary termination charge.

But, while the Commission's authority to replace access tariff regulation with intercarrier compensation regulation under Section 251(b)(5), and to prescribe the structure of intercarrier compensation, is secure, the Commission's authority to establish a specific rate for intercarrier compensation under that Section is more problematic.⁸⁷ Under the Act, intercarrier compensation rates for transport and termination are to be established primarily through negotiations, with disputes (including rate disputes) to be treated through Section 252 arbitrations. Section 252(d)(2) of the Act entrusts the resolution of arbitrations (including the actual setting of rates for transport and termination under Section 251(b)(5)) to state regulators, subject to appeal to a federal district court under Section 252(e)(6) of the Act. The Commission's jurisdiction is generally perceived to be limited to setting rate standards and structures, not in setting rates themselves.

This issue was analyzed in detail in the 1999 *Iowa Utilities Board* decision. The Supreme Court made it clear that the Commission has full power to set rate parameters and rate structures under its own authority under the Act. However, the Supreme Court indicated that the statutory contract/arbitration structure set out in the Act provided that, among other things, pricing of rates for transport and termination of carrier traffic was vested in the states. In speaking of the Commission's prescription of TELRIC rates for unbundled network elements and for transport and termination (in the face of a challenge that the Commission was not

⁸⁷ It would be erroneous to claim that bill-and-keep is actually a rate prescription of zero. Bill-and-keep is a methodology that goes far beyond the simple absence of a charge for transport and termination, and is on much firmer legal ground as within the Commission's jurisdiction than is the prescription of a transport and termination rate itself.

empowered to prescribe TELRIC because that constituted an impermissible setting of interconnection rates by the Commission), the Supreme Court stated:

The FCC's prescription, through rulemaking, of a [requisite pricing methodology] [no more prevents the States from establishing rates than do the statutory "Pricing standards" set forth in Section 251(d).] It is the States that will apply those standards and implement that methodology, determining the concrete result in particular circumstances. That is enough to constitute the establishment of rates.

We hold, therefore, that the Commission has jurisdiction to design a pricing methodology.⁸⁸

This language quite obviously implies that the Commission does not have the authority to impose specific rates on state regulators operating under Section 251(b)(5) of the Act.

Obviously, especially given the ability of the Commission to interpret ambiguous language in the Act even if such an interpretation is contrary to a prior court decision,⁸⁹ a Commission decision interpreting Section 251(b)(5) and Section 252(d)(2) as permitting it to establish an actual rate could well withstand judicial scrutiny. It is by no means clear that the Supreme Court found that these Sections of the Act were unambiguous. But the Commission must be aware that there is danger in tripping too lightly over jurisdictional problems, and the Missoula Plan does not provide the Commission with a solid basis for establishing transport and termination rates. Qwest's proposal for a universal bill-and-keep at the edge approach to intercarrier compensation, on the other hand, avoids this problem because bill-and-keep is a rate methodology rather than a rate. In any event, if the Commission desires to implement an intercarrier compensation plan that includes a specified rate for transport and termination of carrier traffic, it must take additional steps to secure its jurisdiction.

⁸⁸ *AT&T Corporation v. Iowa Utilities Board*, 525 U.S. 366, 384-385 (1999) (bracketed material bracketed in original).

⁸⁹ *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967, 125 Sup. Ct. 2688, 2701 (2005).

In this regard, the Missoula Plan suggests that the Commission might be able to enhance its jurisdiction over rates for transport and termination by forbearing “from the application of sections 252(c) and 252(d)(2) to the extent that they would preclude the Commission from prescribing rate caps for intercarrier compensation involving Track 1 and 2 carriers.”⁹⁰ Qwest submits that Section 10 of the Act does not give the Commission authority to “forbear” from statutory limitations on its own jurisdiction. If the Commission had the authority to “forbear” from statutory limitations on its jurisdiction, then it would have unlimited license to enter any regulatory arena it wanted, something that is clearly not contemplated by Section 10 of the Act.⁹¹ Indeed, efforts by an agency to forbear from its enabling statute would risk violating the constitutional prohibition against delegation of legislative powers.⁹² Forbearance cannot be used as a tool to enhance and expand Commission authority. Qwest recommends that the Commission not adopt that particular approach to establishing the uniform termination structure described in the Missoula Plan.

B. FCC Authority Over Intrastate Originating Access.

The Missoula Plan also contemplates, ultimately, a uniform rate structure for originating access, both interstate and intrastate. Again, it is imperative that such a uniform structure be established, and it is therefore equally vital that the application of the structure to intrastate originating access be on firm legal ground. At this point the Missoula Plan’s approach seems to be twofold: 1) “incentives” to state regulators that “voluntarily” buy into the unitary Plan; and

⁹⁰ Missoula Plan at Attachment A, p.7.

⁹¹ Such limitless forbearance authority would be analogous to the Commission’s decision, reversed on appeal, that it had the authority to determine which forbearance petitions it would actually review under the forbearance criteria set forth in the Act. *See AT&T, Inc. v. FCC*, 452 F.3d 830, 835 (D.C. Cir. 2006).

⁹² *American Trucking Associations, Inc. v. United States*, 344 U.S. 298, 309-13 (1953).

2) potential preemption of state authority in the future if a state does not sufficiently participate in the Plan to allow it to work satisfactorily.⁹³ Neither of these approaches provides sufficient certainty to permit the Plan to function satisfactorily. It is imperative that the entire plan be jurisdictionally solid before it can be implemented. Incentives to states that participate willingly and quickly are, as is discussed above, a good idea, but not a sufficient approach. The possibility of future preemption actions is totally insufficient because there is no guaranty that the preemption petition will be granted, that it will be sustained on appeal if granted, or that it will be acted on at all.

The Commission must deal with intrastate originating switched access in a manner that is lawful, certain and stable in any intercarrier compensation plan if that plan is to be lawful and rational. The Missoula Plan provides no guaranties on any of those fronts.

Qwest submits that there is a superior approach that presents a much more realistic way of ensuring that jurisdictional pitfalls do not ruin a comprehensive and economically rational intercarrier compensation plan.

The Commission's ability to devise and sustain a proper intercarrier compensation structure will be greatly enhanced through maximum participation of state regulatory representatives, especially if the costs and revenues assigned to intrastate access were assigned to the interstate jurisdiction. This can be done, but requires participation by a federal-state joint board as specified in Section 410 of the Act. Qwest recommends a minor modification to the

⁹³ Under the Missoula Plan, a carrier would not need to charge for originating switched access. Given the necessity of allowing carriers the opportunity to recoup losses caused by the plan, this choice by a carrier would still implicate some aspects of intrastate ratemaking, albeit probably in the area of local exchange rates.

proposal that it made in its July 20, 2005 Reply Comments in this docket.⁹⁴ Specifically, Qwest suggests that the Commission convene a Joint Board pursuant to Sections 410(a) and (c), and that it be charged with the following:

- Determining how the costs and revenues assigned to the intrastate jurisdiction and recovered via access charges can and should be assigned to the interstate jurisdiction. A joint board can recommend a uniform methodology to accomplish this so that the differing allocations between access service and local service implemented by various states can be given proper account.
- Determining how to calculate the proper amount to be assigned to the interstate jurisdiction given the differing rate structures of the various states.
- Determining the optimal method of ensuring that revenue shifts under the separations process do not result in concomitant revenue shifts within states (*e.g.*, reducing local rates and retaining current access charge levels).
- Determining the scope of the Commission's jurisdiction to ensure nationwide uniformity in implementation of intercarrier compensation.
- Determining the optimal implementation tools to permit the Commission to prevent/remedy actions by state regulators that would disrupt a nationwide intercarrier compensation structure.

Obviously the Commission, acting in coordination with a federal-state joint board, has the authority to accomplish the revenue, cost and investment shifting necessary to permit it to set uniform rates for SLCs. However, given the critical importance of a national solution to intercarrier compensation, Qwest submits that the Commission should make use of the joint

⁹⁴ Reply Comments of Qwest Communications International Inc. on Further Notice of Proposed Rulemaking, CC Docket No. 01-92, filed July 20, 2005 at 30-35.

board for broader study than simply separations shifts. Section 410(a) allows a federal-state joint board to be convened to address “any matter arising in the administration of this [Act],” and Section 410(b) especially encourages conferring with state regulators “regarding the relationship between rate structures, accounts, charges, practices, classifications, and regulations of carriers subject to the jurisdiction of such State commission and of the Commission; . . .”⁹⁵ A federal-state joint board seems ideally situated to address these issues and make a recommendation to the Commission for further action. Any action taken by the Commission regarding its jurisdiction over matters traditionally viewed as subject to the exclusive jurisdiction of state regulators that involves consultation with a joint board will be likely to be more sensitive to legitimate state regulatory concerns and to survive appellate challenge if one or more states was unsatisfied with the rules ultimately adopted by the Commission.

Obviously there is a potential tension between the need for the Commission to move quickly on intercarrier compensation and the recommendation that a joint board be convened. Joint board actions are generally thorough and laborious, and accordingly slow. However, this does not need to be the case. Qwest submits that the Commission is fully authorized to set time limits on joint board deliberations in order to ensure timely resolution of the issues presented. In addition, it must be noted that this proceeding is already five and a half years old, with no end in sight. Had the Commission convened a joint board at the outset of this proceeding, or even a year and a half ago when the *Further Notice* was released,⁹⁶ the joint board would have had ample time to complete its work even under a more leisurely schedule. A federal-state joint board has the potential to actually move the critical issues raised in this docket closer to closure.

⁹⁵ 47 U.S.C. § 410(a), (b).

⁹⁶ *In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Notice of Proposed Rulemaking, 16 FCC Rcd 9610 (2001), *Further Notice of Proposed Rulemaking*, 20 FCC Rcd 4685 (2005).

Especially if the Commission imposes a time limit on the joint board's deliberations and continues its own study, we see very little possibility that convening a federal-state joint board will actually delay resolution of this docket.

IV. CONCLUSION

While the Missoula Plan is not a satisfactory solution to the critical problems posed by the current intercarrier compensation structure (or, more accurately, lack of structure), it does present serious thinking and has the significant advantage of potentially moving the intercarrier compensation process forward. Qwest submits that it is imperative that the Commission take advantage of the filing of the Missoula Plan and set about the vital task of establishing intercarrier compensation rules.

Respectfully submitted,

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October 25, 2006

CERTIFICATE OF SERVICE

I, Richard Grozier, do hereby certify that I have caused the foregoing **COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.** to be 1) filed with the FCC via its Electronic Comment Filing System in CC Docket No. 01-92; 2) served via e-mail on Ms. Victoria Goldberg, Pricing Policy Division, Wireline Competition Bureau at Victoria.Goldberg@fcc.gov; and 3) served via e-mail on the FCC's duplicating contractor Best Copy and Printing, Inc. at fcc@bcpiweb.com.

/s/Richard Grozier

October 25, 2006